Supreme Court, U.S.
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No. 99-1878

IN THE
Supreme Court of the United States
OCTOBER TERM 1999

JOHN G. STRAND, JOHN C. SHEA, AND DAVID A. SVANDA,
Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
AND CLIMAX TELEPHONE COMPANY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The federal Telecommunications Act of 1996 ("FTA") allows State public service commissions to choose to arbitrate and approve carrier-to-carrier interconnection agreements. The FTA specifies the remedy for carriers aggrieved by State commission action. Where Congress specifies a remedy in the context of a complex statutory scheme like the FTA, can private parties bring an *Ex parte Young* action in federal court against individual State public service commissioners seeking more expansive remedies of (i) prospective injunctive relief against enforcement of a commission-approved interconnection agreement and (ii) declaratory relief that aspects of that commission-sanctioned agreement are not consistent with, inter alia, federal law.

LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, NARUC states as follows:

The National Association of Regulatory Utility Commissioners ("NARUC") is supported predominantly by dues paid by its State Public Utility Commission members and through revenues generated by triennial meetings of those members. NARUC has no parent company, subsidiary, or affiliate.

Parties to the case include: (1) Petitioners - John G. Strand, John C. Shea, and David A. Svanda, Commissioners of the Michigan Public Service Commission, and (2) Respondents - Michigan Bell Telephone Company d/b/a Ameritech Michigan, Climax Telephone Company, the United States of America, and the Federal Communications Commission.

A number of entities filed as amici below, including NARUC and the individual public service commissions of Ohio, Kentucky, Tennessee, Pennsylvania, and New York.

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STATUTES

Communications Act of 1934, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 *et seq.*, Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("1996 Act" or "Act" or "FTA") ..... *passim*

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IN THE
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v.

MICHIGAN BELL TELEPHONE COMPANY
AND CLIMAX TELEPHONE COMPANY
Respondent.

INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications common carriers within their respective borders.

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1 In accordance with U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., all parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. In addition, pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC states the following: (1) NARUC's General Counsel authored this brief with the assistance of NARUC's member commissions, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC made a financial contribution to the preparation or submission of this brief.

Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.[2]

All of NARUC's State commission members are concerned by the circuit court decision presented for review. This Court's disposition of Michigan's petition will have a critical impact on future State actions taken pursuant to the Telecommunications Act of 1996[3] and also on numerous ongoing federal district and circuit court litigation involving NARUC's members. Because of that impact, and the related inappropriate and extensive expansion of the *Ex parte Young* doctrine, *NARUC's counsel has been specifically instructed by all of its members to support the Michigan commission in this litigation.*

NARUC's member commissions regulate intrastate telecommunications services including local phone service supplied by incumbent local exchange carriers ("ILECs"),

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2 See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. Cf, 47 U.S.C. § 254 (1996). See, also, *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See, also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

3 *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 *et seq.*, Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("Act" or "FTA").

like respondent Michigan Bell Telephone Company. The State commissions are obligated to ensure that local phone service supplied by such ILECs is provided at just and reasonable rates. Emerging economic pressures and structural changes in the industry join with recent federal and State legislation to focus these regulators' attention and resources on encouraging the ILECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market. See, e.g., the FTA provisions specifying a critical role for States to assure ILEC compliance with their FTA obligations to interconnect and provide nondiscriminatory access to competitors. 47 U.S.C. § 252 (1996).

State commissions have an obvious interest in protecting their scarce resources, sovereignty, and the integrity of their procedures from non-consensual private-party suits in federal court in violation of the Eleventh Amendment. To protect these interests, NARUC continues to oppose all unwarranted expansions of the *Ex parte Young* doctrine like that permitted by the Sixth Circuit in the decision presented for review. Unless reversed, we believe the Sixth Circuit's flawed *Ex parte Young* analysis will provide the vehicle for additional, costly, and unnecessary litigation against NARUC's member commissions. Moreover, by granting certiorari, this Court can eliminate the significant diversion of federal and State resources focused on duplicative litigation on this precise issue in several federal district and circuit courts of appeal. Accordingly, NARUC urges this Court to grant certiorari and ultimately, on the merits, reverse the Sixth Circuit decision presented for review.

SUMMARY OF ARGUMENT FOR GRANTING THE WRIT

Did the Sixth Circuit err by finding the *Ex parte Young* exception to a State's Eleventh Amendment[4] immunity allows federal suits for alleged violations of the Telecommunications Act of 1996 ("FTA" or "Act")? Supreme Court precedent indicates parties may seek prospective relief in federal court against individual State officials for violations of federal law under the *Ex parte Young* doctrine only where (a) Congress has not prescribed a detailed remedial scheme and (b) no special State sovereignty interest is involved. See, e.g., *Seminole Tribe of Florida v. Florida ("Seminole Tribe")*, 517 U.S. 44, 116 S. Ct. 1114 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997); *Ex parte Young*, 209 U.S. 123 (1908). NARUC respectfully suggests that (i) Congress prescribed a specific remedial scheme targeting State arbitrations of interconnection agreements in the 1996 legislation[5] and (ii) States have a special sovereignty interest

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4 The Eleventh Amendment states:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

5 The Act states:

> "In any case in which a State commission makes a determination under this section, any party aggrieved . . .may bring an action in an appropriate federal district court to determine whether the agreement. . .meets the requirements of Section 251 and this section." 47 U.S.C. § 252(e)(6).

footnote continued on next page

in the use of their public rights-of-way to ensure that their citizens receive high-quality low-cost telephone service. *Idaho v. Coeur d'Alene Tribe of Idaho*, supra; *Ex parte Young*, supra. Thus, the *Ex parte Young* exception to a State's sovereign immunity from suit in federal court does not apply in the circumstances presented for review.

ARGUMENT

INDIVIDUAL COMMISSIONERS ARE NOT SUSCEPTIBLE TO INJUNCTIONS FOR ALLEGED VIOLATIONS OF THE FTA UNDER EX PARTE YOUNG.

NARUC agrees with both the Sixth Circuit and petitioners' assertions that this Court's holding in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666; 119 S. Ct. 2219 (1999), eliminates the argument that the Michigan Commission constructively or implicitly waived sovereign immunity by participation in the FTA's regulatory scheme.[6] Moreover, NARUC contends the Sixth Circuit's holding that individual members of the Michigan commission are susceptible to injunctions for

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The Act also forbids State court review, stating "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). Cf. *Seminole*, supra

6 "It is precisely because the waiver doctrine no longer provides a reliable basis for seeking relief against State commissions that we agreed in *Michigan Bell*. . . .with the Seventh Circuit's decision . . .and premised our conclusion that the plaintiff could proceed with its suit against the commission solely on *Ex parte Young* . . .grounds." *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000).

alleged violations of the FTA is inconsistent with this Courts pronouncements in *Ex parte Young*, 209 U.S. 123 (1908), and subsequent related decisions.[7]

A. CONGRESS PRESCRIBED A DETAILED REMEDIAL SCHEME IN THE FTA.

In *Seminole Tribe*, this Court held that the *Ex parte Young* exception to Eleventh Amendment immunity does not apply where "Congress has prescribed a detailed remedial scheme for enforcement against a State of a statutorily created right." 116 S. Ct. at 1132. Based on the facts presented, the *Seminole* decision found that a State government's alleged failure to negotiate compacts allowing gaming on Indian reservations should not result in court injunctions pursuant to *Ex parte Young* because Congress had, in fact, prescribed a detailed remedial scheme in the Indian Gaming Regulatory Act ("IGRA"). Id. The IGRA specified good faith tribe-State negotiations subject to a 60

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7 In *Ex parte Young*, a federal court enjoined a State official from bringing suit to enforce a State statute that allegedly violated the due process clause of the Fourteenth Amendment. The Court held when a State officer violates federal constitutional provisions, that officer has in effect been stripped of State authority - because the State could not be presumed to condone or authorize action that violates federal law - and can thus be sued as an individual. As discussed infra, the Supreme Court's decisions in *Seminole Tribe of Florida v. Florida*, supra, and *Idaho v. Coeur d'Alene Tribe of Idaho*, supra, "mark a significant narrowing of the scope of the *Ex parte Young* doctrine." *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1189 (10th Cir. 1998)(concluding that plaintiffs' challenges to an allegedly unequal State taxing system were not saved by *Ex parte Young*).

day deadline. If the tribe and the State could not conclude a pact in that time frame, the parties would select a mediator who picked one compact. If the State then failed to adopt it, the Secretary of Interior could then establish gaming regulations. Id., 116 S. Ct. at 1132-1133; 25 U.S.C. § 2710(d)(7)(B). As Congress constructed this remedial scheme, the Court found there was no basis for concluding that Congress also intended individual State officials to be subject to federal suits. Id., 116 S. Ct. 1133 n. 17.

The FTA presents basically the same situation. Like the IGAA, the FTA provides detailed provisions for compulsory arbitration of interconnection agreements, consisting of: (1) a 135-day initial negotiation between the incumbent local exchange carrier and their competitors, 47 U.S.C. § 252(b)(1); (2) a period of 135 days to 160 days in which a State commission may be petitioned for arbitration, 47 U.S.C.§ 252(b)(4); (3) a 25-day period for responses to the petition, 47 U.S.C. § 252(b)(3); (4) a State commission decision within nine months of the initial request for arbitration, 47 U.S.C. § 252(b)(4); (5) filing of an agreement with the Commission, which will then act between 30 and 90 days, depending upon the type of agreement, 47 U.S.C. § 252(e)(4); and (6) review of the State commission action. 47 U.S.C. § 252(e)(6). As the Seminole Court observed, it is hard to see why an aggrieved party would "suffer through" the remedies designed by Congress "when more complete and immediate relief would be available under *Ex parte Young*." *Seminole,* 116 S. Ct. at 1132. Just as the Supreme Court decided that the remedial scheme of the IGRA precluded application of *Ex parte Young*, so too the remedial scheme of the 1996 Act shows that Congress did not intend

courts to allow *Ex parte Young* actions against State officials implementing the 1996 Act.[8]

B. THE STATES HAVE SPECIAL SOVEREIGNTY INTERESTS IN THE USE OF PUBLIC RIGHTS OF WAY TO PROVIDE TELEPHONE SERVICE

In *Idaho v. Coeur d'Alene Tribe of Idaho*, supra, this Court held that the Coeur d'Alene Tribe could not invoke the *Ex parte Young* exception to Eleventh Amendment immunity to sue individual Idaho State officials over title to certain submerged lands in the State. 117 S. Ct. at 2043. That decision found that Idaho's special sovereignty interest in the land and navigable waters within its borders required that the Eleventh Amendment bar injunctions against individual Idaho officials seeking prospective injunctive relief over legal title to State land. Id. at 2040-2041. The decision emphasized that it was vital that Idaho be able to exercise its sovereignty to protect the public right to use navigable waterways. Id. at 2041-2042.

Like Idaho, Michigan and the NARUC's other member States have a special sovereignty interest in ensuring

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[8] Congress' intent to provide for review of actions by State commissions and not individual State officials is also revealed by the title of Section 252(e)(6), "Review of State commission action" and by the language of the section allowing for review "in any case in which a State commission makes a determination under this section." 47 U.S.C. § 252(e)(6). As the Supreme Court cautioned in *Seminole*, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a State official based on *Ex parte Young*." 116 S. Ct. at 1132.

their public rights of way are used by utilities to provide safe, reliable and reasonably priced local telephone service. Just as the State of Idaho has a sovereign interest in preserving public access to its navigable waters that prevented a suit against Idaho officials under *Ex parte Young*, so too, do the States have a special interest in requiring telephone companies to provide access to their networks in public rights of way to competitors to ensure the public's interest in receiving the best possible telephone service at the lowest price. This sovereign interest is particularly keen as the States focus resources upon assuring their citizens reap the maximum benefit of the new telecommunications technologies revolutionizing telephone service.

The *Coeur d'Alene Tribe* Court was not willing to discard such special sovereignty interests by allowing *Ex parte Young* suits against individual State utility commissioners. 117 S. Ct. at 2043.[9] We believe similar restraint is warranted in this case.

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9 *Coeur d'Alene Tribe* emphasized that the courts of Idaho would answer the Tribe's claim to State lands and waters. Id. at 2035, 2037-2038, 2043. If telephone companies lack the remedy of a private suit against a State, that is solely the result of Congress' decision to preclude private suits against State commissions in State court. 47 U.S.C. § 252(e)(4). Given that § 252(e)(6) violates the Eleventh Amendment, perhaps § 252(e)(4), which is part and parcel of the same judicial review provision, should fall as well. In any event, another potential remedy for allegations of State violation of the Act may lie with the Federal Communications Commission, either through its rulemaking powers or by bringing its own suit against a State in federal court. See *Alden v. Maine*, 119 S. Ct. at 2269, where the Court notes:

footnote continued on next page

CONCLUSION

For the reasons set forth, supra, NARUC urges the Court to grant the writ of certiorari.

Respectfully submitted,

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("[t]he difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State, and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second").